

STATE OF MICHIGAN
COURT OF APPEALS

JAMES VELTING and KV INVESTMENTS
LLC,

UNPUBLISHED
September 22, 2009

Plaintiffs-Appellants,

v

CASCADE CHARTER TOWNSHIP,

No. 283638
Kent Circuit Court
LC No. 99-008930-CZ

Defendant-Appellant.

Before: M. J. Kelly, P.J., and K. F. Kelly and Shapiro, JJ.

PER CURIAM.

This zoning matter is back before us after this Court remanded the case to the lower court to conduct a de novo review of plaintiffs' substantive due process claim and to clarify the status of plaintiffs' 42 USC 1983 claim. *Velting v Cascade Charter Twp (Velting I)*, unpublished opinion per curiam of the Court of Appeals, issued May 5, 2005 (Docket No. 250946). On remand, the trial court held that plaintiffs' substantive due process rights had not been violated and concluded that plaintiffs' § 1983 claim had been dismissed. Plaintiffs now appeal as of right and we affirm.

I. Basic Facts and Procedural History

Plaintiffs own about 60 acres of land located in Cascade Charter Township. This parcel is divided into two tracts by 48th Street, which runs east to west across the land, and is abutted by the Little Harbor residential development on its western side. In addition, a railroad runs in a diagonal direction across the property. Where this railroad intersects with 48th street, the railroad crosses over the street via a bridge. This land was zoned R-1 residential. According to plaintiffs, their property contains nearly 2 million cubic tons of sand that they wished to excavate and sell as construction grade sand. The township's zoning ordinance did not expressly prohibit the excavation of natural resources from land zoned R-1 residential, but required individuals to apply for a special planned unit development (PUD) that would rezone the prospective site of the mine if it met certain qualifications.

A. PUD Application

In July 1998, plaintiffs submitted an application for rezoning of their property as a PUD in order to extract the sand from their property. The mining was to be set back 200 feet from the

Little Harbor development and plaintiffs anticipated employing a “bowl” concept that would minimize impact on the surrounding residential areas. Plaintiffs’ proposal envisioned mining the land over a period of 7 years. Eventually, however, this period was shortened to 3 years and 7 months, based on the possibility that plaintiffs would provide sand for the state’s M-6 highway project, which was located within a half mile of plaintiffs’ property. Plaintiffs also planned to reconstruct a portion of 48th Street at their own expense in conjunction with the Kent County Road Commission (KCRC) as part of their mining efforts.

While plaintiffs’ application was pending it became clear that a major area of concern for both parties was the viaduct on 48th Street. At the time of these events, 48th Street did not meet minimum design standards for road design and two trucks hauling sand could not pass under the 48th Street viaduct at the same time. Although plaintiffs’ application sought to help the KCRC reconstruct the roadway, they would not do so until after plaintiffs had excavated the majority of sand from their property. In other words, the haul route that plaintiffs would use if rezoning was approved would result in hundreds of trucks per day traveling both ways through the viaduct. After extensive consideration of plaintiffs’ rezoning application the planning commission recommended denying the PUD application and the township board denied it.

B. Complaint and Pre-trial Procedures

In September 1999, plaintiffs appealed the board’s decision by filing suit in the trial court. In their complaint, plaintiffs alleged that the township’s decision violated their equal protection and substantive due process rights, constituted a regulatory taking and perpetuated an invalid and exclusionary zoning scheme. As a result of these alleged wrongs, plaintiffs sought declaratory, equitable, and monetary relief under 42 USC 1983. Defendant removed the matter to federal court. That court, however, dismissed without prejudice plaintiffs’ federal claims, including their 42 USC 1983 claim, because those claims were unripe. The parties stipulated this dismissal. The federal court remanded the remaining state claims to state court.¹

Plaintiffs re-filed both their state and federal claims in state court, adding an additional count alleging a violation of the fair and just treatment clause of the Michigan Constitution. Defendant answered that complaint. Defendant then moved for summary disposition on all counts, which the trial court denied in part. The trial court ruled that all plaintiffs’ claims could go forward to trial, but that plaintiffs’ federal claims, including its 42 USC 1983 claim, had been dismissed by stipulation. The trial court reserved the right to make further rulings as to the federal claims after hearing the proofs at trial. Accordingly, when the parties submitted their trial briefs, plaintiffs again raised their arguments relating to their federal claims. Notably,

¹ Although it is not clear from the lower court record, it seems likely that plaintiffs’ federal claims were deemed unripe because plaintiffs had failed to seek just compensation for their takings claims in state court. See *Williamson Co Regulatory Planning Comm’n v Hamilton Bank*, 473 US 172; 105 S Ct 3108; 87 L Ed 2d 126 (1985). A takings claim will not be ripe for review in the federal forum until the plaintiff has sought compensation through state court procedures. *Id.* at 194-195.

plaintiffs addressed their federal substantive due process claim and their state substantive due process claim separately.

Before the matter could proceed to trial, however, the KCRC reconstructed the road adjacent to plaintiffs' property. As a result, it became uneconomical for plaintiffs to extract sand from the parcel. Consequently, plaintiffs no longer wished to pursue approval of the PUD application, thereby abandoning their exclusionary zoning claims and their request for equitable and injunctive relief. Plaintiffs now solely sought monetary compensation on the basis that the township's denial of the application constituted a regulatory taking, violated their right to equal protection, and denied them substantive due process under both the U.S. Constitution and the Michigan Constitution, as well as violated their right to fair and just treatment under the Michigan Constitution.

C. Bench Trial

The matter proceeded to a bench trial. The parties' proofs revealed conflicting testimony on the issue of traffic safety on 48th Street. Typically, sand and gravel trucks were permitted to travel over this road and their routes were not limited to one-way traffic. However, existing mining operations that hauled materials through the 48th Street viaduct to the M-6 project only traveled one way through the viaduct. For example, the KCRC approved a permit for a contractor to haul materials from mining operations to the M-6 project using a circular route that avoided two-way traffic under the 48th Street viaduct and also resulted in a shorter route. In addition, sand taken to the M-6 project from the Ver Meulen pit, Cherry Valley pit, and Josuma pit, either did not travel on 48th Street or traveled very little on 48th Street and in only one direction. Before traffic had been directed this way, however, trucks hauling sand to other projects had been allowed to travel both ways through the 48th Street viaduct and had done so allegedly without any incident.

David Groenleer, KCRC's engineering director during the relevant time period, testified that at the time of plaintiffs' zoning application 48th Street did not meet minimum design standards. He indicated that there were no shoulders on the road under the viaduct, that vehicles had scraped the sides of the bridge when passing through the viaduct, and that two trucks could not fit under the viaduct at the same time but had to yield to one another in order to travel in opposite directions and making it necessary for them to slow dramatically. In addition, steep grades leading up to the viaduct made it difficult for motorists to see a vehicle approaching from the opposite direction. Groenleer also testified that citizens had complained to the road commission and were "scare[d]" of the railroad structure on 48th Street.

Richard Beaubeien, a traffic engineering consultant and defendant's expert at trial, corroborated Groenleer's testimony. According to Beaubeien, the 48th Street viaduct is essentially a "one-lane" underpass with steep grades and sharp curves leading up to it on both sides. Beaubeien testified that denial of the PUD was the better option in terms of traffic safety at the 48th Street viaduct as it would reduce, or avoid, two-way truck traffic through the viaduct. However, if the PUD was approved, the accelerated schedule of the mining operation would result in hundreds of plaintiffs' trucks per day passing both ways through the viaduct, in addition to trucks that already used 48th Street one way.

A school bus driver also testified that he complained to the township board regarding the dangerous conditions on 48th Street. According to the driver, the road generally had lots of “blind spots,” many curves, and was too narrow “for [busses] to get off the road to do our pick-ups and our drops [of children].” The driver testified that the “excessive speeds of the trucks that we were having problems with gave us quite a start a couple of times . . .” The driver further indicated that the viaduct presented particular concerns for bus drivers because neither truck drivers nor bus drivers could see if a vehicle was approaching from the other direction. On numerous occasions, before truck traffic had been directed away from the 48th Street viaduct, the busses had to “slam on the breaks” or “back up and get out of the way” of oncoming trucks going too fast through the underpass.

Some evidence presented at trial suggested that traffic safety on 48th Street was safe, would not be worsened if the PUD was approved, and might actually result in safer travel in the county. A contractor who hauled materials to the M-6 project testified that he did not consider two-way travel through the 48th Street viaduct to pose a “significant safety issue,” but asserted that avoiding that situation would be the better scenario. Groenleer, despite his testimony regarding the dangerous aspects of 48th Street, testified that trucks had operated safely on 48th Street and that it was not an inherently dangerous road. Edward Swanson, plaintiffs’ traffic expert who had prepared a traffic safety analysis for the township, testified that his report found that if the PUD was approved traffic on 48th Street could be “handled reasonably safely,” would result in greater traffic safety in the township because trucks would not be traveling longer distances to the M-6 project, and that the denial of plaintiffs’ application did not enhance traffic safety on 48th Street. However, Swanson’s opinion did not take into consideration the 48th Street viaduct and he admitted that two-way travel through the 48th Street viaduct would create traffic conflict. William Savage, another of plaintiffs’ experts who had provided recommendations to the township during the pendency of plaintiffs’ application, testified that approval of the mine would not result in worsened traffic conditions on 48th Street and would result in safer travel in the county because plaintiffs’ trucks would be traveling a shorter distance. Savage admitted, however, that there was an “urgency” to eliminate the 48th Street viaduct because of the “very limited sight distance” in that area.

In addition to concerns regarding traffic safety, testimony revealed that homeowners in the Little Harbor development were concerned that their property values would decrease as a result of the mining. The township’s planning director testified that the township’s appraiser had anticipated a flattening of the property values in the nearby development in the short term while the mine was operating, but expected no permanent decrease in home values. Defendant’s real estate appraisal expert, John Meyer, testified that the property values of homes in the Little Harbor development would increase at a rate less than 50 percent of the rate at which home values increase in properties not adjacent to mining operations. But according to plaintiffs’ real estate appraisal expert, the mine would have had no impact on the market value of single-family residential properties.

Other evidence presented at trial related to the public’s interest in obtaining sand from plaintiffs’ mine. At the time of plaintiffs’ application for rezoning, the township knew that other mines existed to supply the M-6 project with sand. Eight other mines were operating in the area, thereby decreasing the demand for another mining facility. Doug Ver Meulen, who operates a mining business in Calcedonia, Michigan, sent a letter to the township when plaintiffs’

application was pending to “voice his position on the availability of material [in the area.]” At the time, the Ver Meulen mine had 4.5 million cubic yards of material, 90 percent of it sand, and was supplying the M-6 project with sand of a quality that met the project’s needs. The contractor who hauled the sand to the M-6 construction site from the Ver Meulen and Cherry Valley pits testified that the net cost of materials from those mines was substantially the same as it would have been had the sand come from plaintiffs’ mine and, despite the increased distances he had to travel from those mines, that he was able to complete the project within his bid amount. Further, even after the conclusion of the M-6 project, millions of yards of material remained available for sale from the Cherry Valley pit.

At the end of the nine-day bench trial, the trial court found no cause of action on all of plaintiffs’ claims and dismissed the suit. Although the trial court had previously considered all plaintiffs’ federal claims to be dismissed, it took the opportunity it had reserved at the summary disposition hearing to address those issues after hearing the proofs at trial. The trial court’s opinion considered plaintiffs’ equal protection claim and regulatory takings claim, applying federal and state law in both instances; plaintiffs’ allegation that the denial of the zoning application had violated the fair and just treatment clause of the Michigan Constitution; and, plaintiffs’ claim that the denial of the rezoning constituted a violation of substantive due process under the no very serious consequences test. And, although the trial court did not explicitly apply the rational basis test applicable to zoning regulations allegedly offensive to substantive due process, which is synonymous with the federal test, the trial court concluded that the “township is not liable for any cause of action as set forth in the plaintiffs’ complaint.” The trial court’s decision was appealed to this Court.

D. *Velting I*

In the first appeal, this Court affirmed the lower court’s decision in all respects, except in regard to its determination on plaintiffs’ substantive due process claim. *Velting I, supra* at 2-3. The Court determined that the lower court erred by reviewing plaintiffs’ substantive due process claim “as an appellate court rather than a court of first instance” and thereby affording the township board’s decision too much deference. *Id.* at 2. Accordingly, this Court remanded the matter, specifically instructing the lower court to conduct a “de novo review of the ‘very serious consequences’ issue” of the substantive due process analysis. *Id.* at 3. Further, this Court noted that the state of plaintiffs’ 42 USC 1983 was unclear and mandated the trial court clarify the status of the claim. *Id.* at 3.

E. Trial Court’s Decision on Remand

Before the remand hearing, plaintiffs moved to amend their complaint. In plaintiffs’ view, because the trial court determined defendant had acted properly under the incorrect standard of review, plaintiffs’ other claims, including its 42 USC 1983 claim, were never decided by the trial court, and thus, plaintiffs now sought to address those issues before the trial court. Defendant argued that the motion to amend was untimely, as it was brought more than two years after trial, and that all plaintiffs’ claims were fully adjudicated, as indicated in the trial court’s first written opinion. Defendant urged the trial court to fulfill part of this Court’s remand order and clarify that it had dismissed the 42 USC 1983 claim. The trial court denied plaintiffs’ motion, ruling that no basis existed for amending the complaint after a trial. In addition, the

court determined that plaintiffs' federal claims, including its 42 USC 1983 claim, had been adjudicated at trial and had been dismissed.

Subsequently, the parties submitted remand briefs on the substantive due process issue. Defendant argued that the public had a very low interest in extracting the sand from the subject land and that plaintiffs failed to establish that the extraction of minerals would not have very serious consequences. In response, plaintiffs countered that the township's decision to deny the rezoning application was arbitrary, failed to further a legitimate government interest, and was based on nothing more than pure speculation, which is entitled to no consideration. In addition, plaintiffs submitted that the public had a high interest in the resources, as they were located at that specific point in time, and that they had demonstrated a lack of serious consequences.

The trial court ruled in favor of defendant. It determined that the public's interest in the resources, at the time proposed for extraction, was low, and that plaintiffs had failed to establish a lack of "very serious consequence." The trial court, stating that it had reviewed the entire record again as well as the trial transcript, reasoned:

Essentially, there was plenty of available sand in the County in that area that could be used for the M-6 project.

* * *

[T]he public interest was low, there was plenty of sand available from a number of locations at an as-good or better, or at least comparable price than what resulted from the 48th Street property.

The Court also agrees with defendant here that the plaintiff [sic] has failed to meet its burden on the very serious consequences test, and there's a myriad of facts restated here by the defendant in their remand brief, pages 12 through 32, with which the Court agrees.

I know,[plaintiffs], you've accused the defendant of cherry-picking here. However, I think there are a lot of cherries on the tree from which to pick. And there are substantial facts which support the defendant's position here and which support the Court in ruling here that there is no substantive due process violation.

So the Court reaffirms its earlier decision, and, of course, uses the proper standard, the de novo review from the trial court record, and disregards any deference whatsoever to any findings of the township board.

This appeal followed.

II. Standards of Review

We review constitutional questions de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997). However, our review of findings of fact made by a trial court sitting without a jury is for clear error. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). "A factual finding is clearly erroneous, although there is evidence to support the finding, if the

reviewing court is left with a definite and firm conviction that a mistake has been made.” *Heindlmeyer v Ottawa Co Concealed Weapons Licensing Bd*, 268 Mich App 202, 222; 707 NW2d 353 (2005) (citation omitted). In conducting such review, this Court must give deference to the trial court’s factual findings. *Id.* Further, whether the trial court followed this Court’s remand order is a question of law that we review de novo. *Schumacher v Dep’t of Natural Resources*, 275 Mich App 121, 127; 737 NW2d 782 (2007).

III. Substantive Due Process

Plaintiffs first argue that the trial court erred by again applying the incorrect standard of review and by finding no violation of their right to substantive due process. We consider each argument in turn.

A. Trial Court’s Standard of Review on Remand

Plaintiffs contend that the trial court failed to conduct a de novo review of the no serious consequences issue, but erroneously deferred to the township’s findings. Plaintiffs point to the fact that the trial court only referenced the facts recounted in defendant’s remand brief in support of its conclusion. We disagree. To conduct a de novo review, a tribunal must consider all matters in issue “anew; afresh; over again” *Dep’t of Civil Rights v Silver Dollar Cafe*, 441 Mich 110, 116; 490 NW2d 337 (1992) (citation omitted). The tribunal’s assessment must give no deference to the determination made below and it “may substitute its assessment for the findings, conclusion, and decision [of the body it is reviewing.]” *Id.* Black’s Law Dictionary (8th ed) defines de novo judicial review as “A court’s nondeferential review . . . , usually through a review of the . . . record plus any additional evidence the parties present.”

Here, the trial court explicitly stated on the record that it had reviewed the entirety of the proceedings and conducted a de novo review of the evidence affording no deference to the township board’s findings. The fact that the trial court adopted the facts listed in defendant’s remand brief in support of its conclusion in no way indicates that it deferred to the township board, as plaintiffs argue. Rather, it reflects that the trial court weighed defendant’s evidence more heavily and assigned more credibility to the testimony of defendant’s witnesses. Plaintiffs point to no other evidence in the record in support of their argument, and there being no other indication that the trial court deferred to the township board’s decision, we reject plaintiffs’ argument.

B. The No Very Serious Consequences Test

Plaintiffs also submit that the trial court erred by finding that they failed to meet their burden under the no very serious consequences test, as announced in *Silva v Ada Twp*, 416 Mich 153; 330 NW2d 663 (1982). We cannot agree.

In this matter, the Court directed the lower court to conduct a “de novo review of the ‘very serious consequences’ issue.” *Velting I*. That test, unique to Michigan law and only applied in situations where a zoning ordinance affects a landowner’s ability to extract natural resources, posits that such zoning regulations are invalid, and therefore unconstitutional, unless very serious consequences would result from permitting the excavation of those natural resources. *Silva, supra* at 156. This analysis differs from the test applied in traditional zoning

cases. In those traditional cases, a zoning ordinance is presumed valid and the burden is on the party challenging the zoning to show that it is an arbitrary and unreasonable restriction upon his use of the property and that there is no reasonable government interest being advanced by the present scheme. *Delta Charter Twp v Dinolfo*, 419 Mich 253, 267-268; 351 NW2d 831 (1984); *Kirk v Tyrone Twp*, 398 Mich 429, 439-440; 247 NW2d 848 (1976); *Kropf v Sterling Hts*, 391 Mich 139, 160-162; 215 NW2d 179 (1974).

Under the no serious consequences analysis, however, “the party challenging the zoning has the burden of showing that there are valuable natural resources and that no ‘very serious consequences’ would result from the extraction of those resources.” *Silva, supra* at 162. Clearly this test creates a more rigorous standard of reasonableness favorable to the landowner, thereby affording the landowner heightened protection under the substantive due process clause of the Michigan Constitution. *Kyser v Kasson Twp*, 278 Mich App 743, 748; 755 NW2d 190 (2008) lv gtd 483 Mich 982 (2009);² *American Aggregates Corp v Highland Twp*, 151 Mich App 37, 40; 390 NW2d 192 (1986); see also *Silva, supra* at 158-159. It is irrelevant under this test whether the present zoning classification advances a legitimate government interest: Any present zoning classification preventing the extraction of natural resources will be unconstitutional if no serious consequences would result under the proposed rezoning, regardless of whether the present zoning non-arbitrarily advances a legitimate government interest. The courts of this state have sanctioned this additional constitutional protection in these types of zoning cases in recognition of “the important public interest involved in extracting and using natural resources” *Id.* at 40. Further, because the rationale on which this test is based is the public’s interest in the extraction of natural resources, “the degree and extent of public interest in the specific natural

² We note that the constitutionality of the “very serious consequences” test has been called into question by our Supreme Court. In April 2009, that Court granted the application for leave to appeal in *Kyser, supra*, and required the parties to brief the following issues:

(1) whether the “no very serious consequences” rule of *Silva v Ada Township*, 416 Mich 153; 330 N.W.2d 663 (1982), was superseded by the enactment of 1978 PA 637, MCL 125.297a (now recodified in nearly identical language as MCL 125.3207); (2) whether the “no very serious consequences” rule violates the separation of powers doctrine by providing enhanced judicial review of local zoning decisions; and (3) whether the “no very serious consequences” rule impermissibly shifts the burden of proof onto the local government to defend its zoning policy. [*Kyser v Kasson Twp*, 483 Mich 982; 764 N2d 267 (2009); see also *Kyser v Kasson Twp*, 483 Mich 897; 761 NW2d 692 (2009) (Corrigan, J., and Young, J., dissenting) (originally denying leave to appeal).]

However, because the Court has not yet issued its opinion, *Silva* and its progeny remain good law and we are bound to follow it. “A decision of the Supreme Court is binding upon this Court until the Supreme Court overrules itself” *O’Dess v Grand Trunk Western RR Co*, 218 Mich App 694, 700; 555 NW2d 261 (1996).

resources located in the landowner's land is a relevant[, although not determinative,] factor in reviewing the reasonableness of the zoning regulation." *Id.* at 43. It follows that:

If public interest in the specific landowner's resource is very high, the consequences resulting from the extraction of the resource will not reach the level of "very serious" as readily as in the case where public interest in the specific resource is relatively low.

* * *

[Conversely], if public interest in plaintiff landowner's resources is relatively low, plaintiff must make a very strong showing that no "very serious consequences" will result from the extraction of the resources. [*Id.* at 44-45.]

Here, there is no dispute between the parties that plaintiffs' land contains natural resources. Rather, the heart of the dispute concerns the second prong of the no very serious consequences test. On remand, the trial court declared that it had reviewed the entire record, and announcing that it had afforded the township's findings no deference, adopted the facts recounted in defendant's remand brief in support of its conclusion that very serious consequences would result. The trial court stated:

Essentially, there was plenty of available sand in the County in that area that could be used for the M-6 project.

* * *

[T]he public interest was low, there was plenty of sand available from a number of locations at an as-good or better, or at least comparable price than what resulted from the 48th Street property.

The Court also agrees with defendant here that the plaintiff [sic] has failed to meet its burden on the very serious consequences test, and there's a myriad of facts restated here by the defendant in their remand brief, pages 12 through 32, with which the Court agrees.

Those facts, stated succinctly, include (1) hazardous traffic conditions, (2) a decrease in the value of surrounding properties, and (3) the creation of significant noise and dust in the surrounding areas. Because the level of public interest involved effects the strength of the showing that plaintiffs must make under the second prong of the no very serious consequences test, we first considers plaintiffs' argument related to the public's interest in plaintiffs' sand.

1. Public Interest

Plaintiffs argue that the trial court erred by concluding that the public's interest in the excavation of plaintiffs' sand at the time of the rezoning application was low. Specifically, plaintiffs contend that the public's interest in the mine at this particular location was high because the rezoning would have supposedly resulted in less truck traffic, would be preferable

for safety reasons, and would have assisted in expediting improvements to 48th Street while reducing the county's cost for reconstructing the road. We disagree.

Plaintiffs' argument wrongly suggests that the focus of the public interest inquiry is what effect the excavation of natural resources will have on the surrounding area, its infrastructure, or the county's budget. Rather, the focus of the inquiry is on the public's interest in the extraction of the specific natural resource located on the owner's land, as affected by market conditions related to that resource in that location in existence at the time. *American Aggregates Corp*, *supra* at 43. The trial court's analysis properly honed in on these factors when considering the surrounding community's interest in the sand located on plaintiffs' land.

Further, record evidence supports the court's finding that sand of the same quality and comparable price was available for the M-6 highway project from multiple different mines in the surrounding area. The trial court noted the demand created from the M-6 highway project, and then indicated that an adequate supply of similar quality sand was already available at a similar price. Additionally, eight different sand mines existed in the area and the contractor who delivered sand to the M-6 project testified that he was able to obtain sand at a price comparable to that had sand been available from plaintiffs' mine. Given this evidence, we have no definite and firm conviction that the trial court erred in finding that the public's interest in the excavation of plaintiffs' sand was low. See *Heindlmeyer*, *supra* at 222.

The trial court did not clearly err by determining that the public's interest was low. Having concluded that the trial court properly found that the public's interest in the sand located in the proposed mine was low, it follows that plaintiffs were required to "make a very strong showing that no 'very serious consequences' [would] result from the extraction of the resources." *American Aggregates*, *supra* at 45.

2. No Very Serious Consequences

Plaintiffs next argue that there is no evidence on the record to support the trial court's findings that serious consequences would result from the proposed rezoning. Plaintiffs contend that the evidence at most demonstrates that the rezoning would have resulted in a merely temporary inconvenience.³ Again, we disagree. The trial court's findings in support of its conclusion are each considered in turn.

³ Plaintiffs also raise an additional argument related to the trial court's determination of the no very serious consequences issue. Specifically, plaintiffs contend that the trial court relied on facts that the township board allegedly did not rely upon in support of its denial of the rezoning application. Even assuming this allegation as true, the argument is unavailing. The no serious consequences test does not focus on the specific facts that a township may or may not have relied upon in denying a zoning application. Rather, the focus of the test is on whether a plaintiff can show that no very serious consequences would result from the rezoning. If a plaintiff can make such a showing, then the denial of the rezoning application, for whatever reasons, is unreasonable and unconstitutional. In short, the reasons relied upon at the time by the township when it denied plaintiffs' application are irrelevant under the no serious consequences test, and

(continued...)

i. Traffic Safety

Plaintiffs assert that the evidence showed that their mine would have no negative effects on traffic safety on 48th Street and that the trial court erred by finding that the traffic safety concerns gave rise to very serious consequences. However, numerous witnesses at trial testified to the hazardous conditions of the 48th Street viaduct, the potential for conflict when trucks traveled both ways through the viaduct, as well as the conditions of 48th Street generally. Groenleer testified that 48th Street did not meet minimum design standards. The road was characterized as containing steep grades that restricted motorists' sight, sharp curves, and had few or no places to pull-off the road. With respect to the viaduct, it was not much more than a "path" and had no shoulder. Two trucks could not simultaneously pass through the viaduct and it was evident from the sides of the underpass that vehicles had scraped its walls. Further, vehicles approaching the viaduct from either side could not see whether a vehicle was approaching from the opposite direction, as sharp grades led up to the viaduct on both sides. Trucks passing through the viaduct had to significantly slow down and yield to one another. School busses had also encountered risky conditions under the viaduct. One school bus driver testified that busses had to slam on the brakes or back up to get out of the way of oncoming trucks hauling materials. Concerned citizens had also voiced complaints to the township board regarding the 48th Street viaduct. At the time of plaintiffs' rezoning application, 48th Street already had some large trucks hauling sand traveling on it. However, these trucks only traveled one way as to avoid traveling both ways through the 48th Street viaduct. If plaintiffs' rezoning application was approved, however, it would be necessary that hundreds of trucks hauling sand per day would begin to travel both ways through the underpass. While some testimony indicated that these circumstances would be reasonably safe as compared to increasing truck traffic in other areas of the county, other testimony indicated that approval of the mine would worsen an already dangerous situation at the 48th Street viaduct. Thus, there was evidence that plaintiffs' mine would have negative effects on traffic safety.

Further, while some evidence does tend to indicate that serious consequences would not result if the rezoning had been approved, it is not this Court's duty to weigh the evidence or evaluate the credibility of the witnesses. Rather, we must defer to the trial court's superior opportunity to observe and evaluate the evidence presented before it. *Attorney General ex rel Director of Dep't of Natural Resources v ACME Disposal Co*, 189 Mich App 722, 724; 473 NW2d 824 (1991). Here, there is adequate evidence to support the trial court's finding that serious traffic safety concerns would result in serious consequences if the PUD was approved. Given the foregoing, it cannot be concluded with a definite and firm conviction that a mistake has been made.

ii. Property Values

Plaintiffs next argue that the trial court erred by determining that surrounding home values would decrease as a result of the mine. This argument is also without merit. Testimony on the record supported the trial court's finding. While plaintiffs' expert opined that the mining operation would have no effect on property values, defendant's witnesses testified that home

(...continued)

as a result, plaintiffs' argument has no merit.

values would decrease in the short term and that their overall rate of growth in value would also decrease. Once again, it is for the trial court to weigh the evidence and judge the credibility of the witnesses, not this Court. *Id.* And, after our review of the evidence, we have no definite and firm conviction that the trial court's finding was clearly erroneous. Evidence on the record supports the court's findings and this Court must defer to the trial court's conclusion.

iii. Dust and Noise

Plaintiffs also submit that no evidence was presented at trial to support a finding that dust and noise would result from rezoning. There is no merit to this argument, as it ignores other evidence on the record indicating the opposite. In conducting a de novo review, the trial court was not limited to consideration of the trial testimony, but was entitled to review the entire record afresh. See *Dep't of Civil Rights, supra* at 116. Although we were not able to locate trial testimony regarding the effects of dust and noise, the township board's final resolution noted its concern with dust and noise that the mine would cause, as well as the increased truck traffic on 48th Street. The resolution also noted that the mining operation would flatten a hillside, causing more noise from a nearby highway to reach the residential development. This evidence supports the trial court's finding that noise and dust would result from plaintiffs' mining operation and we cannot conclude that the trial court clearly erred.

Given the foregoing evidence, the trial court did not clearly err in finding that approval of plaintiffs' PUD would worsen an already dangerous traffic condition on 48th Street, have a negative impact on home values, and create noise and dust in the surrounding area. Taking all this evidence together in light of the entire record, it is our view that trial court did not clearly err by concluding that plaintiffs failed to make a strong showing that no very serious consequences would result from the rezoning. See *American Aggregates Corp, supra* at 45. Accordingly, we conclude that the trial court did not err by finding that plaintiffs' substantive due process rights had not been violated.

IV. 42 USC 1983

Plaintiffs next contend that the trial court erred by dismissing their § 1983 claim. In particular, plaintiffs allege that the trial court's finding that it had adjudicated that claim is erroneous because it failed to analyze the § 1983 claim at any point during the litigation. We disagree.

42 USC 1983 is the all-purpose federal civil rights statute that provides a remedy for violations of the federal constitution.⁴ To establish liability under this provision, the injured party must establish: "1) the deprivation of a right secured by the Constitution or laws of the

⁴ Notably, plaintiffs cannot collect money damages against a municipality, like defendant, for violations of the Michigan Constitution. See *Jones v Powell*, 462 Mich 329, 337; 612 NW2d 423 (2000). Thus, if plaintiffs can establish a violation of federal law, § 1983 provides plaintiffs with an avenue through which to collect money damages. See *Morden v Grand Traverse Co*, 275 Mich App 325, 332; 738 NW2d 691 (2007).

United States and 2) the deprivation was caused by a person acting under color of state law.” *Morden v Grand Traverse Co*, 275 Mich App 325, 332; 738 NW2d 278 (2007) (citation and quotation marks omitted). Here, plaintiffs’ § 1983 claim is predicated upon their claim that their federal substantive due process rights were violated.

The substance of the analysis for a federal substantive due process claim, upon which the 42 USC 1983 claim is predicated, and substantive due process claim under the Michigan Constitution is the same. *People v Sierb*, 456 Mich 519, 522-524; 581 NW2d 219 (1998). In the absence of any affect on a suspect class or deprivation of a fundamental right, the traditional test “to determine whether a law or its enforcement violates substantive due process is whether the law is rationally related to a legitimate governmental purpose.” *Cummins v Robinson Twp*, ___ Mich App ___ ; ___ NW2d ___ (2009) (quotation marks and citation omitted). And, in the context of zoning disputes, this same rational basis test applies as described earlier. *Delta Charter Twp*, *supra* at 267-268; *Kirk*, *supra* at 439-440; *Kropf*, *supra* at 160-162.

However, as already noted, the courts of this state have promulgated the no very serious consequences test to be applied when the zoning regulation affects mineral rights. In this context, federal and state rights are not coextensive. Rather, in Michigan, the landowner is afforded more protection under the Michigan Constitution than under the federal constitution. See *Silva*, *supra* at 158-159; *Kyser*, *supra* at 749; *American Aggregates Corp*, *supra* at 40. If there is no constitutional violation under the heightened standard of the no very serious consequences test, then it necessarily follows that there can be no violation under the lesser standard of the rational basis test. In other words, if the township’s decision in this matter passed constitutional muster under the no very serious consequences test, thereby meeting this more stringent standard, then the township’s action also necessarily met the less stringent standard of the rational basis test. That is the case in the instant matter. Thus, regardless of whether the trial court adjudicated plaintiffs’ federal claim or not, plaintiffs have no viable § 1983 claim. The result the trial court reached was correct and, even if it reached that result for the wrong reasons, we will not reverse its decision on that basis. *Coates v Bastian Brothers, Inc*, 276 Mich App 498, 508-509; 741 NW2d 539 (2007). Accordingly, we decline to grant plaintiffs the relief requested.

V. Remaining Issues

Finally, plaintiffs’ brief on appeal raises numerous arguments unrelated to the no serious consequences test and their §1983 claim. We decline to consider these issues. The general rule is that the lower tribunal may not take action on remand that is inconsistent with the judgment of the appellate court and that any further appeal is limited to the issues addressed in the remand order. *Schumacher*, *supra* at 127-128. This Court initially remanded the matter to the lower court with explicit instructions that it should reconsider the no very serious consequences issue under a de novo standard of review and also clarify the status of the 42 USC 1983 claim. This Court cannot now on appeal consider those matters raised by plaintiffs that are outside the scope of that remand, especially since this Court in *Velting I* was otherwise satisfied with the trial court’s analysis and affirmed the trial court’s opinion in all other respects. See *Schumacher*, *supra* at 127-128. Accordingly, we will not consider plaintiffs’ other arguments as they relate to the traditional rational basis test and damages, and are otherwise outside the scope of this Court’s remand order.

Affirmed.

/s/ Michael J. Kelly
/s/ Kirsten Frank Kelly
/s/ Douglas B. Shapiro